NG KIM HOY

v.

BANK BUMIPUTRA (M) BHD.

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[ORIGINATING SUMMONS NO. 31-303 OF 1988]
16 NOVEMBER 1989

CIVIL PROCEDURE: *Declaratory relief - Construction of power of attorney - Default of pleadings by defence - Order 28 r. 8 of the Rules of the High Court 1980.*

The plaintiff is the registered owner of EMR 176 Lot 854 (the said land). On 26 July 1983, she entered into a joint venture agreement with Kulai Jaya Sdn. Bhd. (Kulai Jaya) for the development of the said land into a light industrial estate. To this end, she executed a power of attorney in favour of Kulai Jaya. On 20 June 1984, she executed a second power of attorney in favour of Kulai Jaya. A week later, she charged the said land to the defendant as security for an overdraft facility for the benefit of Kulai Jaya. On 12 September 1984, Kulai Jaya, as her attorney under the second power, charged the said land again to the defendant to secure an overdraft as additional working capital. The plaintiff's husband was at all material times a director and shareholder of Kulai Jaya and it was on this basis that the plaintiff executed the power of attorney to Kulai Jaya. From the time of the creation of the second charge on 12 September 1984 up to the filing of this application on 13 April 1988, she made no inquiries about her title to the said land because she did not know to which bank the said land had been charged.

The plaintiff seeks declarations that:

(a) that the power of attorney granted to Kulai Jaya did not empower it to charge the said land to the defendant for the purpose of financing a housing project taken over from another company;

(b) that the charge dated 19 September 1984 executed by Kulai Jaya pursuant to the power of attorney is void and of no effect.

(c) that the defendant return the title to the said land to the plaintiff and

(d) that the land administrator remove the charge from the register.

Held:

[1] It is well established as a matter of procedural law that an originating summons claiming a declaratory decree may be taken out for the determination of any question of construction arising out of a written instrument subject however to the Court's discretion, after taking into account a variety of considerations, to decline to make a declaration especially where one of the considerations involves questions of fact which can only properly be resolved by the evidence of witnesses after a trial.

[2] It is clear that a power of attorney is to be strictly construed and that where an act purporting to be done thereunder is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument either in express terms or by necessary implication and that the recital controlled the generality of the operative part of the instrument.

[3] It is a practice of long standing that the Court does not make declarations of right either on admissions or in default of pleadings. If declarations ought not to be made on admissions or by consent, they should also not be made in default of defence.

[4] In the circumstances, as there has been default of pleading by the absence of any affidavit in reply on the part of the defendant and as the Court is not satisfied on the available evidence, the Court declined to make any of the orders sought and instead made certain orders pursuant to O. 28 r. 8 of the Rules of the High Court 1980.

[Defendant to file pleadings within 14 days.]

Cases referred to:
Danby v. Coutts & Co. [1885] Ch. D. Vol. XXIX 50
Bryant, Powis, and Bryant, Limited v. La Bangue du Peuple, etc. [1893] AC 170
Wallersteiner v. Moir [1974] 3 All ER 217

Legislation referred to:
National Land Code 1965, s. 340(2)(b)
Rules of the High Court 1980, O.28 r.8

For the plaintiff - C.Y. Ong; M/s. Ong & Ong
For the defendant - P.T. Teh; M/s. Abdul Raman Saad & Associates & Abdul Razak Ahmad; M/s. Abdul Razak Ahmad & Co.

JUDGMENT

LC Vohrah J:

By originating summons (Encl. 3) the plaintiff seeks a declaration that a power of attorney granted to Kulai Jaya Sdn. Bhd. ("Kulai Jaya") did not empower it to charge the plaintiff's land EMR 176 Lot 854 ("the said land") to the defendant for the purpose of financing a housing project taken over from Yondazgreen Sdn. Bhd., a declaration that the charge dated 19 September 1984 executed by Kulai Jaya as attorney of the plaintiff pursuant to that power is void and of no effect, and an order that the defendant forthwith return the title to the said land to the plaintiff and the land administrator of Kulai forthwith remove the charge from the register.

The three affidavits deposed to by the plaintiff (Encl. 2, Encl. 5A and Encl. 12) disclose the following facts. The plaintiff is the registered owner of the said land. On 26 July 1983 she entered into a joint venture agreement with Kulai Jaya to develop the said land into a light industrial estate and also executed a power of attorney in favour of Kulai Jaya. On 20 June 1984 she executed a second power of attorney in favour of Kulai Jaya and on 27 June 1984 she charged the said land to the defendant as security for an overdraft facility up to RM100,000 for the benefit of Kulai Jaya. On 12 September 1984 Kulai Jaya as her attorney under the second power charged the said land again to the defendant to secure an overdraft of RM200,000 as additional working capital to finance the Taman Kota Kulai project taken over from Yondazgreen Sdn. Bhd.

As a result of the cross-examination of the plaintiff upon the three affidavits filed by her the following facts have been elicited. The plaintiff's husband, one Chong Kei Hen, was at all material times a director and shareholder of Kulai Jaya, the donee of the two powers of attorney. It was because of his position in Kulai Jaya that she executed the joint-venture agreement and the two powers of attorney as she had faith and confidence that the light industrial scheme would succeed. Had her husband not been a director and shareholder of Kulai Jaya she would not have executed the three documents as she did. When she herself

charged the said land for the first time for the RM100,000 overdraft facility for the benefit of Kulai Jaya she knew that the money "would be used to compensate the five dwellers on this piece of land and for earthworks to be done on the land". From the time of the creation of the second charge on 12 September 1984 up to the time of the filing of this application on 13 April 1988, a period of 3½ years, she made no inquiries about her title to the said land because she did not know to which bank the said land had been charged. She knows that her husband is currently being sued by the defendant as a guarantor in respect of the overdraft of RM200,000 secured by the second charge.

So much for the facts adduced at this hearing.

It is well established as a matter of procedural law that an originating summons claiming a declaratory decree may be taken out for the determination of any question of construction arising out of a written instrument subject however to the Court's discretion, after taking into account a variety of considerations, to decline to make a declaration especially where one of the considerations involves questions of fact which can only properly be resolved by the evidence of witnesses after a trial.

Counsel for the plaintiff has founded the plaintiff's claim to declaratory relief on s. 340(2)(b) of the National Land Code which provides that the "the title or interest of any such person or body shall not be indefeasible where registration was obtained by forgery, or by means of an **insufficient or void instrument** ..." He argues that since the second power which the plaintiff gave Kulai Jaya was expressly "to develop the said land into a light industrial scheme", Kulai Jaya in procuring additional working capital from the defendant for the purpose of financing its housing project through the exercise of this power acted outside the general object and authority of the instrument thereby rendering defeasible the interest of the defendant because the registration of its charge had been obtained by means of an insufficient instrument. It is clear on the authorities referred to by Counsel, namely *Danby v. Coutts & Co.* [1885] Ch. D. Vol. XXIX 50 and *Bryant, Powis, and Bryant, Limited v. La Bangue du Peuple, etc.* [1893] AC 170 that a power of attorney is to be strictly construed and that where an act purporting to be done thereunder is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument either in express terms or by necessary implication and that the recital controlled the generality of the operative part of the instrument. The plaintiff's case is that the power did not authorise Kulai Jaya to charge the said land for the purpose of financing its housing project and although there has been no affidavit filed by the defendant to oppose the plaintiff's application, it is obvious from the affidavit evidence of the plaintiff herself and also from the oral evidence elicited from her as a result of her cross-examination pursuant to the notice of intention to cross-examine that she herself had in fact previously charged the said land to the defendant for an overdraft of RM100,000 for the express benefit of Kulai Jaya in order to compensate five dwellers "and to start work on that piece of land". In other words she knew that she was charging the said land for its development but whether the development was in respect of a housing project or a light development scheme the evidence available is somewhat lacking. It was also obvious from her oral evidence that at all material times her husband was a director and shareholder of Kulai Jaya, so that her assertion that she had no knowledge and had not given consent to the creation of the second charge in my view requires further investigation. Further the delay of nearly 3½ years in her filing this application to reclaim her title and its being done only at a time when actions have been brought by the defendant against the directors of Kulai Jaya as guarantors would require further scrutiny. In *Wallersteiner v. Moir* [1974] 3 All ER 217 Buckley LJ has this to say at 251:

> I am more familiar with the practice in the Chancery Division than in any other division of the High Court, but it is probably in the Chancery Division that more use is made of declaratory relief than elsewhere. It has always been my experience, and I believe it to be a practice of very long standing, that the Court does not make declarations of right either on admissions or in default of pleading. A statement on this subject of respectable antiquity is to be found in *Williams v. Powell* [1894] WN 141, where Kekewich J, whose views on the practice of the Chancery Division have always been regarded with much respect, said that a declaration by the Court was a judicial act, and ought not to be made on admissions of the parties or on consent, but only if the Court was satisfied by evidence. If declarations ought not to be made on admissions or by consent, a *fortiori* they should not be made in default of defence ...

In the circumstances, as there has been default of pleading by the absence of any affidavit in reply on the part of the defendant and as I am not satisfied by evidence, I would decline to make any orders on the prayers as they now stand and would instead make an order, in exercise of my powers under O. 28 r. 8 of the Rules of the High Court 1980, (i) that the present proceedings be continued as if the matter had begun by writ, (ii) that the affidavits of the plaintiff stand as pleadings and (iii) that the defendant file its pleadings within 14 days. The defendant will be entitled to its costs.

Also found at [1990] 2 CLJ 69